**CenTrio Energy South LLC *and* UA Plumbers and Steamfitters Local Union 60, Petitioner.** Case 15–RC–280545

April 28, 2022

ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND PROUTY

The Employer's Request for Review of the Assistant Regional Director's Decision and Direction of Election and the Regional Director's Decision on Objections and Certification of Representative is denied as it raises no substantial issues warranting review.

On November 9, 2020, the Board issued its decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), which sets forth the guidelines and parameters applicable to determining the propriety of a mail-ballot election under the current circumstances of the Covid-19 pandemic. In denying review, we note that the direction of a mail-ballot election was consistent with the concerns articulated under Factor 2 of *Aspirus*.[1]

The Regional Director correctly overruled the Employer's objections relating to the conduct of the mail-ballot election in this case. Here, the Employer submitted an offer of proof in which it identified six employees who were willing to testify that they timely mailed ballots that did not arrive at the Regional Office in time for the count. However, as the Regional Director explained, under well-established precedent, the Board does not count mail ballots that arrive after the tally, even if those votes are determinative. See *Classic Valet Parking*, 363 NLRB 249, 249 (2015). For that reason, we find no basis upon which to grant the Employer's request for review of the Regional Director's decision.

Our dissenting colleague notes that the Region received seven ballots in the days following the count and argues that we should make an exception and count the late-arriving ballots, under the "exceptional circumstances" of this case. We share our dissenting colleague's concern about the United States Postal Service's late delivery of many mail ballots after the ballot count. However, we find that the Regional Director's decision not to count the late-arriving ballots was fully consistent with Board precedent and policy and did not constitute an abuse of discretion.

Among other things, our dissenting colleague argues that an "unusually low" number of ballots were returned by the date of the count. However, the Board does not overturn elections simply because of low turnout. See *Lemco Constr., Inc.*, 283 NLRB 459, 460 (1987) (holding that "that election results should be certified where all eligible voters have an adequate opportunity to participate in the election, notwithstanding low voter participation," and that elections will be overturned "[o]nly if it can be shown by objective evidence that eligible employees were not afforded an adequate opportunity to participate in the balloting" (internal quotations omitted)). In this regard, the Regional Director found that there was no "action or event" that precluded the relevant employees from voting or participating in the balloting.

Our dissenting colleague seemingly contends that there was an "action or event" that precluded the relevant employees from voting—a mail-delivery failure—and argues that this failure is similar to manual elections where the Board has, for example, set aside an election where a severe 20-inch snowstorm occurred in and around the election site during the polling period, citing *V.I.P. Limousine, Inc.*, 274 NLRB 641 (1985). Unlike manual elections, in mail-ballot elections, the Board already provides a grace period for ballots that may have, for example, been affected by a mail service delay, by generally permitting ballots received after the due date, but before the count, to be opened and tallied. See *Premier Utility Services, LLC*, 363 NLRB 1524 fn. 1 (2016) (citing *Watkins Construction Co.*, 332 NLRB 828, 828 (2000), *Classic Valet Parking*, supra, and NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11336.5(c)).

Our dissenting colleague further urges that we can prevent the disenfranchisement of the employees who cast the late-arriving ballots by ordering that those ballots be counted. Our colleague's argument, however, overlooks the substantial policy considerations favoring the finality of elections. *Classic Valet Parking*, supra at 249 ("Absent [the Board's rule excluding mail ballots received after the grace period expires], election results could well be delayed for significant periods of time as mail ballots trickle into the regional office."); see also *Versail Mfg., Inc.*, 212 NLRB 592, 593 (1974) (noting that "[t]here must be some degree of finality to the results of an election, and there are strong policy considerations favoring prompt completion of representation proceedings."). Although six of the late-arriving ballots were received by the Regional Office 2 days after the count, one of the ballots our colleague urges should be counted did not arrive at the Regional

[1] Chairman McFerran agrees to deny review of the Assistant Regional Director's mail-ballot determination for the reasons given in her separate opinion in *Aspirus*.

Office until *2 weeks* after the count—a period of time almost as long as the entire time allotted for the mailing and return of the ballots in the first place. While the late arrival of ballots due to mail service delays is unfortunate, we note that these issues were not caused by conduct of the Board or either of the parties and we find that the Board's interest in finality outweighs any disenfranchisement concerns in this instance.

We additionally agree with the Regional Director that the Region's refusal to disclose the number of late-arriving ballots is not a sufficient reason to set aside the election. In the absence of any other objectionable conduct relating to the mechanics of the election, the number of late-arriving ballots is simply not relevant to the outcome of this case. See *Classic Valet Parking*, supra. Accordingly, we find it unnecessary to pass on the Regional Director's reasoning for declining to provide this information to the Employer. That said, in future cases, we believe the better course of action would be for a regional director to disclose the number of late-arriving ballots to any party requesting that information.

It is worth noting, as Chairman McFerran did in her separate opinion in *Aspirus*, that other Federal labor agencies have modernized their election procedures to permit telephonic or electronic voting. See *Aspirus*, supra at slip op. at 10 (concurring opinion). Since 2011, however, the Board's annual budget appropriation from Congress has included a policy statement that the agency may not conduct elections electronically. Id., slip op. at 11 fn. 12 (concurring opinion); see also Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, tit. IV, § 407 (2021). Consequently, for the last 2 years, as the country has grappled with the Covid-19 pandemic and the public health risks inherent in manual elections, a significant percentage of union-representation elections have been conducted by mail. Id., slip op. at 9 (concurring opinion). In light of the Board's limited remote voting options, mail-ballot union-representation elections are likely to remain common for the foreseeable future. Thus, going forward, we encourage Regional Directors to carefully consider the realities of mail service in their area when determining the voting period for mail-ballot elections.

Dated, Washington, D.C. April 28, 2022

Lauren McFerran, Chairman

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, dissenting in part.

The Regional Director issued a certification of representative based on ballots cast by only three of 14 eligible voters, disregarding compelling evidence that at least six voters had mailed their ballot well before the date the ballots were counted in this mail ballot election. In fact, the Region received *seven* ballots in the days following the count, though it refused to disclose the total number of late ballots to the parties even after the Employer specifically requested this information. The Regional Director refused to consider any of the late-arriving ballots, and the majority denies review of this determination. Because the Employer has raised substantial issues regarding the disenfranchisement of eligible voters that warrant review, I respectfully dissent. Rather than disregard these ballots, I would direct the Region to open and count them under the exceptional circumstances of this case.[1]

The Region mailed ballots to 14 eligible voters on October 13, 2021. The Direction of Election stated that ballots were due in the regional office by October 29, 2021, 16 days after they were mailed. At the time of the November 2, 2021 ballot count, the Region had received only three ballots, which the Board agent counted at that time. The Employer filed timely objections supported by an offer of proof that identified six voters who would testify that they mailed their ballots 1 to 2 weeks prior to the deadline. The offer of proof also stated that several of those voters would also provide photos and/or a video of their ballot being mailed. The Regional Director overruled the Employer's objections without a hearing on the basis that "this case involves no apparent cause for ballots not being received on time other than the possible failure of the United States Postal Service to deliver mail ballots," citing *Premier Utility Services*, 363 NLRB 1524 (2016), and *Classic Valet Parking, Inc.*, 363 NLRB 249 (2015).

As noted above, the Regional Director acknowledged that an unspecified number of ballots had been received after the count, but she refused to provide the parties with the number of late ballots. In fact, the Board's records show that seven mail ballots were received by the Region after the count. Of these late-received ballots, six were delivered on the same day, November 4, 2021 (2 days after the count), with postmarks ranging from October 15–25.[2]

[1] I join the majority in denying review of the Assistant Regional Director's direction that the election be held by mail ballot.

[2] The three timely received ballots were postmarked October 14, 16, and 18 and received by the Region on October 19, November 2, and October 22, respectively.

The seventh was received on November 16, the same date that the Regional Director issued her Report on Objections and Certification of Representative.

Initially, I believe that the Regional Director erred in failing to disclose the total number of ballots received after the count. This information in no way compromises the secrecy of any employee's ballot and is plainly relevant for the purpose of evaluating postelection objections. It indicates whether the low number of timely ballots is due to mail ballot failures as opposed to employees simply not voting at all, the extent of any mail delivery failure, as well as whether, as is the case here, the late-received ballots would be determinative if counted. In any event, regions should provide the information in the interest of transparency and promoting public confidence in the Board's election procedures. As such, I agree with my colleagues that regional directors should disclose the number of late-arriving ballots to the parties, upon request.

Turning to the merits, I recognize that the Board did not count ballots received after the count in the mail ballot elections at issue in *Premier Utility Services*, supra, and *Classic Valet Parking, Inc.*, supra. As my colleagues note, those decisions rely on policy considerations favoring the finality of elections. While those considerations support not counting ballots received after the count in many cases, I agree with former Member Miscimarra that "a departure from the Board's normal practice may be warranted in an extremely unusual case . . . when our regular procedures have been deficient, based on the need to satisfy our overriding statutory responsibility to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act." *Classic Valet Parking, Inc.*, 363 NLRB at 249 (Member Miscimarra, dissenting) (internal quotations omitted). In light of the many unusual factors that support opening and counting these late-received ballots, I believe that this is such a case.

First, an unusually low number of ballots were returned by the date of the count, only three out of 14 eligible voters. Second, the Employer provided compelling evidence that six ballots, a potentially determinative number, were mailed well in advance of the deadline but nonetheless were not received in time for the count. The Employer's offer of proof is confirmed by the Board's own records, which show that seven ballots were received after the count and the postmark date for each ballot.[3] That postmark, in turn, demonstrates that the ballots were mailed well before the date set for the count. Moreover, six of those ballots were inexplicably delivered on the same day despite being mailed days apart. This evidence warrants an inference that the late delivery of the ballots was caused by Postal Service delays and not by any negligence on the part of the voter.

The totality of these factors establishes that a significant number of employees were disenfranchised by this mail-delivery failure in a manner similar to the disenfranchisement of a substantial number of voters in a manual election by a severe weather event. In the case of a manual election affected by extraordinary circumstances, such as a severe weather event, the Board will assess "whether the particular circumstances so affected a sufficient number of ballots as to destroy the requisite laboratory conditions under which elections must be conducted." *V.I.P. Limousine*, *Inc.*, 274 NLRB 641, 641 (1985) (setting aside election where snowstorm prevented a determinative number of employees from voting). The Board should do so here as well. Unlike with a manual election, here the Board has received ballots from the employees affected by the mail-delivery failure and can prevent the employees' disenfranchisement by directing that they be counted. The majority's refusal to do so disenfranchises those employees and risks undermining labor stability in this workplace insofar as the votes that were counted may not have been representative of the wishes concerning representation of the unit as a whole.

As the majority acknowledges, the Board has greatly expanded its use of mail ballots in response to the Covid-19 pandemic. In prior cases where parties have objected to the use of a mail ballot on the basis that mail-delivery issues will disenfranchise employees, the Board has responded that "[a]ny party is free to present evidence of any actual disenfranchisement of voters, if applicable, in post-election objections." See, e.g., *TDS Metrocom, LLC*, 18–RC–260318 (June 23, 2020). The Employer has done just that here, yet the majority dismisses its objections all the same. It is worth asking: if the Employer's proffered evidence is insufficient even to get a hearing, what evidence would suffice?

Overall, this case exemplifies the vagaries of mail delivery and underscores the Board's longstanding policy that representation elections should, as a general rule, be conducted manually, either at the employees' workplace or some other appropriate location. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). When mail ballot elections are held, I agree with my colleagues that regional directors should "carefully consider the realities of mail service in their area when determining the voting period." As I explained in *KMS Commercial Painting, LLC*, 371 NLRB No. 69, slip op. at 2 (2022) (Member Ring,

[3] Because the Board's own records establish the relevant facts, there is no need to remand this case for a hearing to evaluate the Employer's offer of proof.

concurring), ongoing and widespread declines in Postal Service delivery standards warrant a longer default delivery period than the 2 weeks currently specified by the Board's Case Handling Manual. It certainly appears that a 16-day period, as was used in this case, would not be sufficient to account for the realities of mail service in future mail ballot elections in the area in which this election was held. In any event, the Board has before it clear evidence that widespread mail-delivery delays disenfranchised a determinative number of voters in this election. The Board could easily remedy that situation by directing that the late-arriving ballots be counted. Accordingly, I respectfully dissent.

Dated, Washington, D.C. April 28, 2022

_____

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD